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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-559

LEE ANDREW JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Lee Andrew Johnson, prays that a writ of certiorari be issued to review the judgment of the

Supreme Court of Florida entered on October 11, 1974, denying his petition for rehearing thereby affirming the judgment of the Supreme Court of Florida on May 28, 1974, wherein that Court denied his petition for rehearing of certiorari thereby affirming the judgment of the Fourth District Court of Appeal of the State of Florida which itself affirmed petitioner's conviction in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, rendered on February 21, 1973.

JUDGMENT AND OPINION OF THE COURT BELOW

The order of the Supreme Court of Florida on October 11, 1974, is set out in Appendix A attached to this Petition. The order of the Supreme Court of Florida denying certiorari is set out in Appendix B attached to this Petition.

The decision of the District Court of Appeals for the Fourth District is set out in Appendix C attached to this Petition. The judgment of the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida is set out in Appendix D.

JURISDICTION OF THIS COURT

1. The date of the judgment sought to be reviewed and the time of its entry is May 28, 1974.

2. A timely filed petition for rehearing was denied on October 11, 1974, thereby making this Petition timely filed.

3. The jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1257 (3) and Rule 22 (1) of the Rules of this Court.

QUESTION PRESENTED FOR REVIEW

Were the petitioner's rights to a fair trial as guaranteed by the Fifth Amendment to the United States Constitution as made applicable to the State of Florida by the Fourteenth Amendment to the United States Constitution, violated when pursuant to Florida Rules of Criminal Procedure 3.140(n) a request for bill of particulars was filed and the State filed a bill of particulars stating that the only people present during an alleged sale were another witness and a confidential informant; yet at the time of trial brought forth two State witnesses who were also allegedly present and the court refused to exclude the testimony of these two witnesses.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

(The pertinent provisions are set out in Appendix E of this Petition.)

STATEMENT OF THE CASE

An Information was filed against the petitioner on May 10, 1972, for one count of sale of heroin. On May 26, 1972, the petitioner filed a motion for statement of particulars asking two questions, to-wit: (1). Please state who was present when the alleged sale of heroin took place and; (2). Please state the exact time and location of the alleged sale. This request for statement of particulars

was made pursuant to Florida Rules of Criminal Procedure 3. 140 (n) which was in full force and effect on June 2, 1972. A copy of said Rule is set out in Appendix F attached to this Petition. A copy of the motion for statement of particulars dated May 26, 1972, is set out in Appendix G attached to this Petition.

On June 2, 1972, the State Attorney filed his bill of particulars in regard to whom was present when the alleged sale took place and answered, "Agent James Thomas, BCNDDIEU, and confidential informant present when alleged sale of heroin took place." A copy of the bill of particulars dated June 2, 1972, is set out in Appendix H attached to this Petition.

The case proceeded to trial on February 21, 1973. At the time of trial the State called as witnesses, not only James Thomas, but two other witnesses who claimed that they were present and observed aspects of the alleged sale. Before they testified, defense counsel asked the court to exclude these witnesses. This is because the action of the State of Florida was unfair and deprived defense counsel of an opportunity to prepare a proper defense.

The court denied the motion and the petitioner was found guilty and sentenced to five years in the State Prison.

On April 12, 1973, a notice of appeal was filed with the District Court of Appeals for the Fourth District. Petitioner filed his brief in the Fourth District Court of Appeal noting as its first question of law involved:

DID THE COURT COMMIT ERROR WHEN IT DID NOT EXCLUDE THE TESTIMONY

OF TWO STATE WITNESSES WHO WERE PRESENT DURING THE ALLEGED SALE OF HEROIN WHEN THE STATE HAD PREVIOUSLY FILED A BILL OF PARTICULARS CLAIMING THAT THE ONLY PEOPLE WHO WERE PRESENT WERE ANOTHER WITNESS AND A CONFIDENTIAL INFORMANT?

A copy of the pertinent page of petitioner's brief is set out in Appendix I attached to this Petition.

On March 8, 1974, the District Court of Appeal for the Fourth District entered its order confirming the conviction of the petitioner thereby adversely deciding for petitioner the Federal question raised. This order is set out in Appendix C attached to this Petition.

On March 21, 1974, petitioner filed his petition for writ of certiorari to the District Court of Appeal, Fourth District, raising again the Federal question raised in this petition. A copy of the pertinent portion of this pleading demonstrating that the Federal question was raised in the Supreme Court of Florida is attached to this Petition as Appendix J.

On May 28, 1974, the Supreme Court of Florida by a four to three vote denied petitioner's writ of certiorari and thereby adversely decided for the petitioner the Federal question. The order of the Supreme Court of Florida to this effect is set out in Appendix B attached to this Petition.

On October 11, 1974, the Supreme Court of Florida denied petitioner's petition for rehearing by a four to three vote.

REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

PETITIONER'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS MADE APPLICABLE TO THE STATE OF FLORIDA BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHEN PURSUANT TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.140 (n) A REQUEST FOR BILL OF PARTICULARS WAS FILED AND THE STATE FILED A BILL OF PARTICULARS STATING THAT THE ONLY PEOPLE PRESENT DURING AN ALLEGED SALE WERE ANOTHER WITNESS AND A CONFIDENTIAL INFORMANT; YET AT THE TIME OF TRIAL BROUGHT FORTH TWO STATE WITNESSES WHO WERE ALSO ALLEGEDLY PRESENT AND THE COURT REFUSED TO EXCLUDE THE TESTIMONY OF THESE TWO WITNESSES.

The Florida Supreme Court has promulgated pursuant to achieving a fair trial certain rules of discovery whereby a defendant is allowed to get information from the State in regard the case against him and thereby help to prepare a defense.

In this regard, Florida Rule of Criminal Procedure 3.140 (n) which was in full force and effect on June 2, 1972, states:

> (n) Statement of Particulars: The court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, when the indictment or information upon which the defendant is to be tried fails to inform the defendant of the particulars of the offense *sufficiently to enable him to prepare his defense.* Such statement of particulars shall specify as definitely as possible the place, date, *and all other material facts of the crime charged* that are specifically requested and are known to the prosecuting attorney, including the names of persons intended to be defrauded. *Reasonable doubts concerning the construction of this rule shall be resolved.* (Emphasis added)

The pertinent portions of Rule 3. 140 (n) are attached to this Petition as Appendix F.

Pursuant to that Rule the petitioner filed a motion for statement of particulars requesting the prosecutor to state who was present when the alleged sale of heroin took place. A copy of this motion is attached to this Petition as Appendix G.

Based upon this pleading filed on June 2, 1972, the State took the position that the only people present when the alleged sale took place was an Agent James Thomas and a confidential informant. A copy of this pleading filed by the State is attached to this Petition as Appendix H.

The confidential informant was never called to testify at the trial but Agent Thomas testified as to the alleged transaction.

During the course of the trial another agent, Lindsay, testified that he was, in fact, present a car length away (TR. 54), during the time when the sale occurred.

When this came to light, defense counsel asked to have the jury removed and raised the question of the witness testifying.

Agent Lindsay testified that he observed the petitioner, another black male, the confidential informant and Agent Thomas exit an apartment and that he observed the black male hand an item to Agent Thomas. He further testified that Agent Thomas handed the black male "something" and observed the black male hand the petitioner something (TR. 53). Further in his testimony he testified that the petitioner appeared to be counting something out (TR. 68).

This episode was placed in time at exactly the same point that Agent Thomas said the sale of heroin occurred. Nevertheless, the court refused to consider Agent Lindsay present at the sale (TR. 55).

> THE COURT: Of course, there is always a possibility that in the future you could always argue he wasn't present at a sale; he didn't see a sale. I mean it is sort of a two-edged sword. It's in the middle. Is he present or is he not present? They took it to be actual presence. I don't think it has to be stricken. A witness list could have been provided. You could have taken depositions of the witnesses. As to the actual presence at the sale or knowledge of a sale, he is not testifying, apparently, to any such thing. He is only saying

what he observed. He can't testify as to what was in the package, or the money, or anything like that. He is only testifying as to the people that he observed, but your Motion is preserved for the record, and properly so, but your request and Motion is denied.

Escort the jury in."

The purpose as spelled out in the Rules for Bill of Particulars is to fully furnish a defendant with things which are necessary for his defense.

It is patently obvious that the Bill of Particulars filed on June 2, 1972, is misleading and unfair in that it gives the impression that there were only two people present; one of them being a confidential informant.

As the court pointed out, depositions could have been taken if the petitioner was aware that there were, in fact, other witnesses present.

The State, however, was not simply content with this. They then called Agent Clark who testified to basically the same testimony as that of Agent Lindsay. Agent Clark was in the same car as Lindsay (TR. 79) and a perusal of the testimony clearly shows that she was actually present during the time when the alleged sale of heroin took place.

It is the duty of the State when filing a bill of particulars to provide certain information. It is bad enough when the State does not disclose information about the case but when the information that is disclosed is errone-

ous and misleading, it is fundamental fairness that the State be bound by their previous enunciations.

The petitioner should have a right to a trial where he is aware of his accusers.

Petitioner admits that he is relying upon a State Rule of Criminal Procedure but submits that once the Rule has been promulgated and both the prosecution and defendant rely on it, to allow the State to mis-use and corrupt the purpose of the Rule by leaving out the names of certain witnesses and then calling them at the trial clearly violates the defendant's rights to a fair trial as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution.

Petitioner submits that if the Supreme Court of Florida will not enforce the rules it has promulgated, it is the duty of the United States Supreme Court to cause this to happen where Federal Constitutional rights to a fair trial are involved.

It is elementary that when the State so clearly misleads an accused as to what witnesses will be called against him, it cannot be said he was given a fair trial.

In the case of *Niemotko v. Maryland*, 340 U.S. 268, this Honorable Court held:

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the lower courts, but will reexamine the evidentiary basis on which those conclusions are founded."

Petitioner submits that a filing of a false and misleading bill of particulars is tantamount to the suppression of the evidence favorable to the accused.

In the case of *Napue v. Illinois*, 360 U.S. 264, this Honorable Court stated that a conviction cannot stand when the State, although in soliciting false evidence, allows it to go uncorrected when it appears.

In the celebrated case of *Brady v. Maryland*, 373 U.S. 83, this Honorable Court through Mr. Justice Douglas, had opportunity to deal with the principle of a fair trial.

> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals."

In the case at bar the misdeeds of the prosecutor clearly caused an unfair trial to the petitioner. The principles as enunciated in *Brady v. Maryland, supra*, therefore, applied.

Convictions should not be obtained by trickery but rather by use of a fair trial to every defendant.

Petitioner prays that this Honorable Court grant its writ of certiorari to determine if the State may make use of the Criminal Procedure Rules by twisting and misleading a defendant and, therefore, denying him his constitutional rights to a fair trial under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

It is respectfully submitted that the Petition for writ of certiorari should be granted and the judgments reversed.

Respectfully submitted,

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